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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

GORDON HAYGOOD and JUDY HAYGOOD,

Petitioners,

vs.

SCOTT SAVAGE, in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer's deliberate omission of facts from a search warrant affidavit, that call into question whether probable cause to search existed, thereby removing those facts from consideration by a magistrate judge, may pierce the officer's qualified immunity under 42 U.S.C. § 1983.

STATEMENT OF INTERESTED PERSONS

This action is before the Court on interlocutory appeal of the grant of qualified immunity by the Eleventh Circuit Court of Appeals to Respondent Scott Savage. The only issue before the Court is whether Respondent Scott Savage may be liable to Petitioners in his individual capacity under the doctrine of qualified immunity from suit pursuant to 42 U.S.C. § 1983.

At all times relevant to this action, Defendants Scott Savage, Randall Johnson, and Mike Pruitt were officers with the Fayette County, Georgia, Sheriff's Department. All were originally sued in their individual and official capacities. Defendants Johnson and Pruitt were granted summary judgment in their individual capacities in the District Court. Fayette County, Georgia, was also a named Defendant in this action. Fayette County, and Defendants Savage, Johnson, and Pruitt were denied summary judgment in their official capacities.

Petitioners' official capacity claims against Defendants Savage, Johnson, Pruitt, and Fayette County, Georgia, are not before this Court on appeal, as the Eleventh Circuit declined to exercise jurisdiction over their appeals. (App. A, p.4).

Third-Party Complaints were filed against Henry Hurston by Defendants Savage, Johnson and Pruitt. Third-Party Defendant Hurston has never filed any responsive pleadings in this action and is presently in default.

Petitioners Gordon and Judy Haygood are represented by Lee Sexton, Esq. and Bruce R. Millar, Esq., Lee Sexton & Associates, P.C., Suite B, 137 W. Mill St., Jonesboro, Georgia. Defendant Scott Savage is represented by Michael J. Goldman, Esq. and Kimberly Houston Ridley, Esq., Hawkins and Parnell, 4000 One Peachtree Street, 303 Peachtree Street, N.E., Atlanta, Georgia.

Defendants Randal Johnson and Mike Pruitt, and Fayette County, are represented by Philip P. Grant, Esq., McNally, Fox & Cameron, P.C., P.O. Box 849, 100 Habersham Drive, Fayetteville, Georgia; James R. Morgan, Jr., Esq., Womble, Carlyle, Sandridge & Rice, P.O. Drawer 84, Winston-Salem, North Carolina.

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Petitioners Gordon and Judy Haygood respectfully pray that a writ of certiorari be issued to review the per curiam judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued in the above proceeding on May 20, 1996.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. B, 3a) is reported at 70 F.3d 92 (11th Cir. 1995). That opinion reversed the February 18, 1994 Order of the United States District Court. (App. B, 11a). The District Court held that, (a) Respondent Savage, the affiant in support of the search warrant, failed to provide the magistrate judge material information which would have negated probable cause had it been included in the affidavit (App. C, 19a); (b) that the warrant was, therefore, not supported by probable cause (App. C, 19a, 28a), and; (c) that, with respect to qualified immunity under 42 U.S.C. § 1983, it was a clearly established violation of a plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit information from a warrant affidavit that, if included, would have vitiated probable cause. (App. C, 28a).

The Eleventh Circuit Court of Appeals held that Respondent Savage's factual omissions from the search warrant affidavit were not so obviously wrong, in light of pre-existing law, as to pierce the officer's qualified immunity under 42 U.S.C. § 1983. (App. B, 9a-10a). The Eleventh Circuit's May 20, 1996 order (App. A, 1a) denying Petitioners' petition for rehearing and suggestion for rehearing en banc is not reported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on December 4, 1995. (App. B, 3a). The petition for rehearing and

suggestion of rehearing en banc was denied on May 20, 1996. (App. A, 1a). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

STATUTORY PROVISIONS INVOLVED

This case involves the application of qualified immunity from suit pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A writ of certiorari is requested in this case to allow this Court to review the Eleventh Circuit Court of Appeals' opinion (App. B, 3a) which held that a police officer's omission of facts from a search warrant affidavit that would call into question whether probable cause to search existed, thereby removing those facts from consideration by a magistrate judge, was not so obviously wrong, in light of pre-existing law, as to pierce the officer's qualified immunity under 42 U.S.C. § 1983. A brief summary of the background facts and proceedings is as follows:

In April of 1992, Henry Hurston contacted Petitioner Gordon Haygood and asked Haygood if he would be interested in purchasing a couch from Hurston's employer, Aaron Rental. Haygood went to Aaron Rental and chose a couch, which Hurston agreed to deliver. Hurston arranged to meet Petitioner Haygood at a local Kwickie store with the couch, so that Haygood could direct Hurston to Haygood's residence.

Unknown to the Petitioners, Hurston had also called the Fayette County, Georgia, Drug Suppression Task Force and "informed" Respondent Scott Savage that Petitioner Gordon Haygood would sell him cocaine. At that time Henry Hurston already had multiple arrests and convictions in the State of

Georgia for engaging police in fraudulent "controlled buys." In fact, Hurston had even been arrested by the Fayette County Narcotics unit for engaging police in fraudulent controlled buys. Respondent Savage, who worked on the Task Force, asked Hurston's name, date of birth, and whether he had ever before supplied information to law enforcement agencies. Hurston responded by giving Respondent Savage a false name, "Larry Sims," a false date of birth, and a phone number.

Respondent Savage ran a criminal history check on "Larry Sims" which was inconclusive. Respondent Savage called "Sims" back and Sims informed him that, while he did not think Petitioner Haygood would sell cocaine to an undercover police officer, he (Sims) believed Haygood would sell cocaine to him. Based only upon that information, Respondent Savage made arrangements to have "Sims" engage Petitioner Haygood in a controlled buy.

Respondent Savage and another officer met "Sims" on a street corner. "Sims" rode with Savage and Sgt. Rose to a vacant parking lot, where "Sims" was searched. No police officer can say whether "Sims'" shoes and socks were removed and checked for contraband. Some identification papers were discovered during the search, but, incredibly, the officers "took no notice of the papers in the informant's pocket, since these papers were not drugs, money, or other contraband." One of the papers ignored by the officers was a citation or insurance card which identified "Larry Sims" as Henry Hurston. At that time, a phone or radio call to local law enforcement units would have revealed Hurston's history of convictions for engaging police in fraudulent controlled buys. Respondent Savage and other officers then placed a small tape recorder into "Sims"/Hurston's pocket, and instructed Hurston to purchase an "eight-ball" (1/8 ounce or 3 grams) of cocaine from Haygood. Hurston was given $200 in two marked one-hundred dollar bills to make the buy.

Hurston placed a telephone call from a pay phone to the Haygood residence and told Gordon Haygood the couch was at the Kwickie Store. Haygood asked his wife and daughter to go to the Kwickie store with him. They were busy, so Gordon Haygood went to the store alone.

Haygood arrived at the Kwickie Store, pumped gas, and went inside to pay and buy cigarettes and a Pepsi. Hurston approached the Petitioner at the cash register. Hurston told Haygood that the couch would be arriving in a few minutes. Haygood decided to move his van away from the gas pumps, and Hurston said he would come with him. Petitioner Gordon Haygood and Hurston exited the store, walked across the parking lot together, and entered the van. Hurston rode in the passenger seat as Haygood drove the van to the side of the store and parked. After a few minutes, Petitioner Gordon Haygood said he was not going to wait all night and told Hurston to call him when he had the couch. Hurston then exited the van and went back to Respondent Savage's car. Petitioner Gordon Haygood drove home.

While Hurston and Petitioner Gordon Haygood were in the convenience store and in the van, Respondent Savage's view of "Sims"/Hurston was at times totally or partially blocked. Savage did not observe anything being passed between Hurston and Haygood.

When "Sims"/Hurston returned from Petitioner's van, he handed Respondent Savage a baggie containing a white powdery substance. Savage then drove "Sims"/Hurston back to the earlier meeting place where "Sims" was again searched. This time the officers saw the name "Henry Hurston" on the papers which they had earlier "taken no notice of." "Sims" admitted that he had lied and that his name was in fact "Henry Hurston." Instead of being arrested for the crime of giving a false name to a police officer, the informant was paid $100 cash for his help with the buy.

Neither Respondent Savage nor any other officer bothered to check the criminal history of "Henry Hurston." At the same time, Respondent Savage also discovered that the tape recorder had been turned-off and had failed to record any of the controlled buy or associated events or conversations.

Respondent Savage next prepared an Affidavit and Application for a Search Warrant, which took approximately two hours, and presented it to Fayette County Magistrate Judge Ingram. During the time that it took to prepare the warrant affidavit, Savage learned that the white-powder weighed approximately five (5) grams, an amount greatly in excess of an "eight-ball" of cocaine, and with a street value much higher than $200 (App. D, 39a). Respondent Savage also conducted some additional investigation, checking with the county tag and tax offices to confirm Petitioner's home address and vehicle registration. (App. D, 39a-40a).

Respondent Savage's warrant affidavit is attached hereto as Appendix D. In the warrant affidavit, Savage omitted the facts that the substance had not been field tested to determine whether it was cocaine, and that 5 grams was more than one and one-half times the amount which $200 would purchase. Subsequent laboratory tests determined that the substance was not cocaine, but some unknown substance. The affidavit also omitted other material facts known to Savage. These facts included; that the confidential informant, C.I. #123, was an unknown and untested source; that at least one other person was present in the store with the informant and Petitioner; that C.I. #123 was not visible to the officers at all times; that a tape recorder was used; that the tape recorder had been turned off; that C.I. #123 had lied to the officers and that when his true identity was discovered, C.I. #123's background was never checked. (App. D, 37a). The subsequent search of the Petitioners' home and car, pursuant to the warrant obtained by Respondent Savage, failed to produce

any evidence of illegal activity, contraband, or the presence of the two marked one-hundred dollar bills.

The United States District Court found that there was no probable cause for the warrant to have issued, had Savage not selectively presented the facts to the magistrate judge. (App. C). The District Court stated:

> The undisputed record of this case reveals several factors which weigh in favor of the plaintiffs' position. At the time the defendants obtained the search warrant, they knew that the informant upon whose information they had relied had given the officers a false name. That alone should have caused the defendants to consider his claims more skeptically. Furthermore, after learning that the informant had lied about his name, it became apparent that the criminal background check that had been run earlier in the day was of little use. Yet after the defendants learned of Hurston's true name, they still neglected to run a background check on him. The record also indicates that the defendants became aware almost immediately after the controlled purchase that the recording device planted on the informant had been turned "off" prior to recording any of the alleged drug transaction. Lastly, the evidence indicates that the informant returned from his meeting with G. Haygood with approximately 5 grams of white powder suspected of being cocaine despite the fact that, according to the officers' knowledge, the $200 dollars should have

> only been able to purchase about three grams. The discrepancy in the amount of cocaine allegedly purchased by the informant compared to what the informant should have been able to purchase is another factor that weighs against a finding of probable cause
>
> * * *
>
> The court finds that the information recited above was material to the existence of probable cause in this case and that the (such) information should have been made available to the magistrate judge prior to the issuance of the warrant. Defendant Savage, the affiant in support of the search warrant, failed to provide to the magistrate judge material information that would have negated probable cause had it been included in the affidavit. Evaluating the validity of the warrant in light of the omitted information, the court finds that it is not supported by probable cause.

(App. C, 18a-19a). The District Court went on to deny Respondent Savage qualified immunity from suit under 42 U.S.C. § 1983. The District Court, citing this court, found that the law "was clearly established at the time of the incident that it is unconstitutional to recklessly omit material facts from an affidavit in support of a warrant" (App. C, 28a), and that "Savage recklessly failed to include the information in his affidavit in support of the warrant." (App. C, 28a).

The Court of Appeals, seemingly ignoring the role of the neutral and detached magistrate, reasoned that Respondent

Savage could have concluded on his own that the omissions were not material. (App. B, 9a; 70 F.3d at 92). The Court of Appeals court also concluded that the law in this area was not so clearly established that Savage's conduct was "not so obviously wrong, in light of pre-existing law," so as to pierce Respondent Savage's qualified immunity. (App. B, 9a-10a).

On May 20, 1996, the Court of Appeals denied the Haygood's petition for rehearing and suggestion of rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit Court of Appeals appears to be in conflict with prior decisions of this Court, of the Eleventh Circuit, and with decisions of other Circuit Courts regarding deliberate and/or reckless omissions of fact from warrant affidavits. *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982); *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990); and *Olson v. Tyler*, 771 F.2d 277 (7th Cir. 1985). Additionally, the Court of Appeals has weakened the Fourth Amendment by granting a police officer immunity to selectively present only those facts the officer deems "material" to a magistrate judge while, at the same time, withholding facts the officer knows may undermine probable cause. Such factual screening effectively eliminates the magistrate's function of making a neutral and detached determination of probable cause. The question raised in this petition is, thus, of great importance in the Eleventh Circuit and throughout the country, as it defines the roles of the police and the magistrate when search warrants are to be issued.

I.

THE ELEVENTH CIRCUIT'S DECISION APPEARS TO CONFLICT WITH DECISIONS OF THE SUPREME COURT, OTHER CIRCUIT COURTS, AND OF THE ELEVENTH CIRCUIT ITSELF.

A. The law is clearly established that omissions from search warrant affidavits may violate constitutional rights.

The Eleventh Circuit stated that Respondent Savage's omissions from the warrant affidavit did not violate clearly established law. The Eleventh Circuit, however, overlooks this Court's ruling in *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), that warrants may be challenged on the basis of material misrepresentation, omissions, or reckless disregard for the truth in the accompanying affidavit. The appeals court also overlooks the similar rulings of a number of other courts, including the Eleventh Circuit and its predecessor, the Fifth Circuit, which have also held that warrants may be challenged on the basis of omissions and misrepresentations.

The Eleventh Circuit has held that a police officer who knowingly makes omissions from a warrant affidavit may be subject to having evidence suppressed. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982); *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980). The evidence is suppressed because the citizen's constitutional rights have been or would be violated otherwise. The standards and law established in *West Point* and *Martin, supra*, regarding omissions from warrant affidavits are straightforward and should be deemed "clearly established" to law enforcement officials. Other circuits are in accord with *Franks, West Point-Pepperell* and *Martin*.

In *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991), the

Court found that in November 1984, the law was clearly established that omissions from a warrant affidavit violated the Fourth Amendment, and that an officer making a material omission could not claim qualified immunity from civil liability. Similarly, in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), the court found that in an action under 42 U.S.C. § 1983, the *Franks* standards of "deliberate falsehood" and "reckless disregard" extended to cover material omissions from warrant affidavits. *Stewart v. Donges*, analyzing *Franks*, as well as caselaw from other circuits, found that it was "a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause." 915 F.2d 572, 583-584 (10th Cir. 1990).

In *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985), the Seventh Circuit Court of Appeals explained that under *Franks*, a reckless omission of material facts could be actionable in a 42 U.S.C. § 1983 action, because the officer who submitted the affidavit could not be said to have acted in an objectively reasonable manner. "An officer's conduct in preparing a warrant that contains only inaccurate statements that are untruthful as that term is defined in *Franks* violates the ... fourth amendment." *Olson*, 771 F.2d at 281. *See also, United States v. Rule*, 594 F. Supp. 1223 (D. Maine 1984) (the court will not tolerate omissions from warrant affidavits); and *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982) (*Franks* extends to material omissions from warrant affidavits). Based upon the foregoing, the Eleventh Circuit has clearly erred in holding that it is not clearly established that omissions from a search warrant affidavit may not impose civil liability on law enforcement officials.

B. The Eleventh Circuit has erred in holding that Respondent Savage could have concluded that facts calling into question the reliability of his information were not "material" and, thus, he properly omitted that information from his affidavit.

The Eleventh Circuit states that even if Respondent Savage omitted the facts known to him regarding the false name, the tape recorder being turned off, and the excessive weight of substance purchased, Savage could conclude that those facts were not material and choose not to present them to the magistrate judge. (App. B, 9a). This is a serious error by the court. The court's statement that: "we conclude that the combination of omitted facts might for some reasonable police officers be insufficient to negate probable cause in these uncommon and specific circumstances," and "a reasonable officer . . . could have concluded that the facts about the alias, tape recorder and weight of the substance would not negate probable cause and, thus, were not material," places the determination of whether a search should take place at all on the officer, rather than where the law says it belongs — on a neutral and detached magistrate judge. (App. B, 9a). Such a ruling represents a radical departure from the Fourth Amendment and the decisions of this Court.

The Supreme Court has long expressed a preference for searches made pursuant to warrants issued after consideration by a neutral and detached magistrate judge. *See United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965). The selective presentation of facts by a police officer virtually eliminates the function of the magistrate judge. In *Ventresca*, the Court explained the importance of the magistrate judge as follows:

> The point of the Fourth Amendment, which is not often grasped by zealous officers, is not

> that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those **inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.** Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant and reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

United States v. Ventresca, 380 U.S. at 106, citing *Johnson v. United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948). The Eleventh Circuit's language is directly contradictory to *Ventresca*. If an officer is authorized to decide which facts to present to a magistrate judge, he or she can virtually guarantee a finding of probable cause.

In *United States v. Rule*, 594 F. Supp. 1223 (D. Maine 1984), the court applied *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), in ruling that the omission of known information which called into question an informant's veracity destroyed the opportunity for an 'informed and deliberate determination' of probable cause by a neutral and detached magistrate. *Rule*, at 1240 (emphasis in original), citing *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

The *Rule* court explained that:

> The information not submitted bore directly

> on the credibility of the informant and was the only information which in any way might have undercut the presentation of the informant's data as that of a reliable source.
>
> * * *
>
> Any determination of this type . . . was properly for the Magistrate... [t]o make an informed decision as a truly neutral and detached decision maker. . . . **Such an unwarranted arrogation of the Magistrate's function demonstrates at best, in view of the critical materiality of the omitted material to the reliability of the informant, a reckless disregard for the truth** of the totality of the contents of the affidavit presented to the Magistrate.

Rule, 594 F. Supp., at 1241.

In this case, the District Court properly determined that Respondent Savage should not have removed from the magistrate the ability to assess the credibility of the information presented.

C. The Eleventh Circuit has erred in granting Respondent Savage Qualified Immunity.

Qualified immunity may not operate as a bar to an action under 42 U.S.C. § 1983 when the plaintiff can show that the Respondent violated a clearly established federal constitutional right or federal rule of law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d. 396 (1982). When a plaintiff successfully shows that the law was clearly established and that

the defendant's conduct violated the law, then the defendant must demonstrate that no material issues of fact remain as to whether the defendants actions were objectively reasonable in light of the law and the information possessed at the time of his actions. *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 1944, 114 L. Ed. 2d 547 (1991) (setting forth the 'objective reasonableness' standard in light of qualified immunity).

The omissions from Savage's affidavit raise the question of whether an officer of reasonable competence would have included the omitted facts and let a neutral magistrate decide the probable cause issue based upon all of the relevant facts. The United States Supreme Court and the Eleventh Circuit each concluded long ago that when such omissions are material to probable cause determination, a warrant may be invalid. *West-Point Pepperell Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982), applying *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (Fourth Amendment may be violated by warrant affiant's reckless disregard for the truth). An officer may not substitute his own interested "judgment" for that of the magistrate. *See United States v. Rule*, 594 F. Supp. 1223, 1240 (D. Maine 1984), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). An officer who recklessly omits material facts from a warrant affidavit is not entitled to qualified immunity. *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990).

In *Nicholson v. Georgia Department of Human Resources*, 918 F.2d 145 (11th Cir. 1990), the Eleventh Circuit ruled that an official is entitled to qualified immunity unless that official was on notice that the conduct in question was unlawful. Based on the foregoing case law from the Eleventh Circuit, the United States Supreme Court, and other federal circuits, the law was clearly established that a law enforcement official may not deprive a magistrate of his or her ability to make a neutral and detached evaluation of probable cause through the deliberate omission of material facts from a warrant affidavit.

CONCLUSION

The Eleventh Circuit has erred in holding that Respondent Savage's conduct, in omitting facts that called into question the reliability of the information received through an informant, was not obviously wrong in light of pre-existing law. The law is, and has been, clearly established that reckless omissions of fact from search warrant affidavits may violate constitutional rights under the Fourth and Fourteenth Amendments. Furthermore, the Eleventh Circuit has seriously diminished the role of the "neutral and detached" magistrate judge in the warrant process by holding that an officer may draw his or her own conclusions concerning what facts constitute probable cause for the issuance of a search warrant. It is imperative that the Eleventh Circuit be reversed. The writ of certiorari should be granted.

Dated: August 19, 1996

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8258

GORDON HAYGOOD, JUDY HAYGOOD,

Plaintiffs-Appellees,

versus

RANDALL JOHNSON, in his individual and official capacity as Sheriff of Fayette County, Georgia, MIKE PRUITT, Lt., in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department, SCOTT SAVAGE, in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department,

Defendants-Third-Party Plaintiffs,
Appellants,

FAYETTE COUNTY,

Defendant-Appellant,

HENRY ALLEN THURSTON,

Third-Party Defendant.

On Appeal from the United States District Court for the Northern District of Georgia

Appendix A

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

BEFORE: EDMONDSON and COX, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 4, 1995

Gordon HAYGOOD, Judy Haygood,

Plaintiffs-Appellees,

v.

Randall JOHNSON, in his individual and official capacity as Sheriff of Fayette County, Georgia, Mike Pruitt, Lt., in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department, Scott Savage, in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department,

Defendants-Third-Party Plaintiffs, Appellants,

Fayette County,

Defendant-Appellant,

Henry Allen Thurston,

Third Party Defendant.

No. 94-8258.

United States Court of Appeals,
Eleventh Circuit.

Dec. 4, 1996.

Appendix B

* * *

Appeal from the United States District Court for the Northern District of Georgia

Before EDMONDSON and COX, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

This case involves several claims brought by Gordon and Judy Haygood pursuant to 42 U.S.C. § 1983, seeking damages arising from a search allegedly conducted in violation of the Fourth and Fourteenth Amendments. Appellants-defendants appeal from adverse rulings on summary judgment motions.

Defendant Savage argues that he was erroneously denied summary judgment. His motion was based on qualified immunity to the plaintiffs' claim that he caused an illegal search to occur by intentionally or recklessly omitting material facts from an application for a search warrant. Defendants City of Tyrone and Fayette County argue that they were entitled to summary judgment on the plaintiffs' section 1983 municipal liability claims against them, which arose from the same search. We hold that Savage is entitled to qualified immunity, but refrain from addressing the municipal liability claims: we lack jurisdiction.

I.

In April 1992, Corporal Scott Savage was on duty at the Fayette County Sheriff's Department Task Force. He received a call from a man who informed him that Gordon Haygood—now

plaintiff in this case—was selling cocaine. The caller identified himself as "Larry Sims." Savage ran a criminal history check on Sims and found nothing. Savage's supervisor ordered a "controlled buy," using Sims as the decoy, to corroborate Sims' story.

Before the controlled buy, Sims was searched to make sure he took into the buy no drugs, money, weapons, and so on. He then called plaintiff Haygood and arranged a meeting at a convenience store nearby. Sims went into the meeting wearing a small tape recorder and in possession of $200 that had been given to him by the police. Agents observed Gordon Hayward arrive, park by the gas pumps, and meet with the informant in the store. Plaintiff and the informant then got into Plaintiff's van, drove around to the darkened side of the building, and sat with the lights off for two minutes. The informant left the van and walked straight to the officers' vehicle, where he presented a small bag of white powder. This bag was later determined (before filing the warrant affidavit) to contain five grams of powder, instead of the 3.5 that the agents expected the $200 to buy.[1]

After the buy, the officers realized that the tape recorder either had been shut off or malfunctioned. They also realized, as "Sims" filled out paperwork, that he carried papers identifying him as Henry Hurston. The informant admitted to the officers that Hurston was his real name; he claimed he had lied because he was frightened that the police would reveal his name to drug dealers who would seek retribution. Had the officers run a second criminal history check at this time, they would have

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1. Savage stated during his deposition that a laboratory test done after the filing of the warrant affidavit showed the substance not to be cocaine.

discovered that Hurston had been arrested and convicted several times for engaging police in fraudulent "controlled buys."[2]

After the controlled buy, Savage filed an affidavit requesting a warrant to search Plaintiff's residence. In the application, Savage asked for and received a "no-knock" provision based on his assertion that drugs can be easily disposed. In the affidavit, he omitted that Hurston had used an alias, that the tape recorder failed, and that the amount of the white powder (which had not yet been tested) was more than the money allotted was expected to have bought. A warrant was issued.

Having received the warrant, Fayette County officers used a battering ram to go through the plaintiff's front door at about 11:00 p.m. Plaintiff and his family were detained in nightclothes while the search of the house and a car took place. The search turned up no evidence of drugs, nor the two $100 bills that Hurston was to have used to buy the drugs.

Plaintiffs filed this action under 42 U.S.C. § 1983, bringing state law claims as well. The district court held that there was no probable cause to search and that Savage was unentitled to summary judgment based on qualified immunity. For defendants Pruitt and Johnson (Fayette County police officers sued in their official and personal capacities) the district court granted them summary judgment in their individual capacities based on qualified immunity. The district court refused to grant summary

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2. In this instance, Plaintiff Haygood alleges that Hurston had contacted him earlier to ask if he would be interested in buying a couch from Aaron Rental, for whom Hurston claimed to work; that Haygood chose the couch, which Hurston agreed to deliver; and that on the night of the controlled buy, Hurston called Haygood to say the couch was at the convenience store.

judgment to Fayette County and the City of Tyrone on the plaintiffs' municipal liability claims. The district court dismissed Plaintiffs' state law claims. Savage appeals the denial of qualified immunity; the local governments appeal the denial of summary judgment on Plaintiffs' claims against them under section 1983.

II.

We review the denial of summary judgment to determine whether Savage's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The question is one of law, and our review is *de novo*. *Elder v. Holloway*, __ U.S. __, __, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994).

The district court held that the facts omitted from the warrant by defendant Savage negated probable cause and that a reasonable officer in Savage's position would have known of the clearly established law forbidding the omission of material facts from a warrant application. Based on these conclusions, the district court determined that Savage caused an illegal search in violation of clearly established law and was, therefore, entitled to no immunity.

The reasoning underlying the district court's holding contravenes that of *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc).[3] There, we stressed that denial of qualified immunity should occur only when the actual conduct

3. *Lassiter* approved no new rules, but did attempt to restate and to clarify the principles of qualified immunity. The district court's decision in this case predates our *Lassiter* decision.

in which the defendant was alleged to have engaged violated clearly established federal law. *Lassiter,* 28 F.3d at 1149-50 (qualified immunity unavailable only if all reasonable government agents in same situation would know that act "violates federal law *in the circumstances*"). Here, the district court concluded that clearly established law holds that a search is invalid when facts deliberately omitted from the warrant would have negated probable cause. We accept this reading of Supreme Court and Eleventh Circuit precedent for motions to suppress. *E.g., West Point-Pepperell, Inc. v. Donovan,* 689 F.2d 950, 960 (11th Cir. 1982); *United States v. Martin,* 615 F.2d 318, 328 (5th Cir. 1980). But, it does not end the analysis in this civil action.

The district court never concluded that what Savage specifically did violated clearly established law. In reality, probable cause is not a precise concept. The district court did not conclude (nor could it rightly have) that Plaintiff met the burden of showing that, *in the light of pre-existing law*, the facts omitted *in this case* were clearly material (that is, that the facts omitted clearly would have negated probable cause if those facts had been included). We, looking at the pre-existing law, hold that the facts omitted here were not so clearly material that every reasonable law officer would have known that their omission would lead to a search in violation of federal law.

Savage omitted from his warrant application that Hurston had used an alias, that the tape recorder had shut off, and that the quantity of cocaine allegedly purchased exceeded the expected quantity by about fifty percent. Savage points out that these facts, taken individually, have rational explanations and do not mean much. Informants commonly use aliases when dealing with the police, tape recorders frequently malfunction, and

variations in quantity occur in drug sales (and are difficult to identify by sight when they do). Thus, none of these facts was sufficient in itself to cast the kind of doubt on the credibility of the informer that would overcome the qualified immunity defense.

More important, however, we conclude that the combination of omitted facts might for some reasonable police officers be insufficient to negate probable cause in these uncommon and specific circumstances. Savage had been physically present at what looked by all appearances to be a typical drug deal: he had witnessed a meeting in a convenience store, a brief drive with no destination, a conversation in a darkened automobile in a darkened corner of a parking lot, and the presentation of what looked to be the drugs promised by the informant (who had been searched just before the "buy"). Having seen those occurrences firsthand, a reasonable officer in Savage's position could have concluded that the facts about the alias, tape recorder and weight of the substance would not negate probable cause and, thus, were not material. *See, e.g., United States v. Martin,* 920 F.2d 393, 398-99 (6th Cir.1990) (observation of controlled buy can overcome questions about informer's credibility).

No pre-April 1992 decisions from this court, Georgia's Supreme Court, or the United States Supreme Court involve facts that are much like the facts of this case. *See generally Courson v. McMillian,* 939 F.2d 1479, 1497-98 & n. 32 (11th Cir.1991) (law can be "clearly established" for qualified immunity purposes by decisions of U.S. Supreme Court, Eleventh Circuit Court of Appeals, or highest court of state where case arose); *D'Aguanno v. Gallagher,* 50 F.3d 877, 880 n. 5 (11th Cir.1995). Savage's conduct was not so obviously

wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done what Savage did. *Lassiter,* 28 F.3d at 1149. Defendant Savage is due immunity.

III.

The governmental parties argued two other questions in briefs to this Court: the merits of the plaintiffs' constitutional claims and the liability of the local governments under *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). For these claims, we no longer have jurisdiction in the light of the Supreme Court's decision in *Swint v. Chambers County Comm'n,* __ U.S. __, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

REVERSED IN PART AND REMANDED.

APPENDIX C—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION FILED FEBRUARY 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CASE NO. 3:92-cv-123-GET

GORDON HAYGOOD; JUDY HAYGOOD

Plaintiffs

V.

RANDALL JOHNSON; MIKE PRUITT; SCOTT SAVAGE; FAYETTE COUNTY

Defendants

V.

HENRY ALLEN HURSTON

Third-party defendant

ORDER

The above-styled matter is presently before the court on the plaintiffs' motion to strike answer, compel discovery and enter default [docket no. 52]; the defendants', Fayette County, Mike Pruitt and Randall Johnson, motion for summary judgment [docket no. 54]; and defendant Scott Savage's motion for summary judgment [docket no. 53].

Appendix C

Background

The plaintiffs initiated this action on July 23, 1992 under 42 U.S.C. § 1983 complaining that the defendants violated the plaintiffs' federal constitutional rights by unlawfully entering and searching the plaintiffs' home without a valid search warrant. The plaintiffs also complain that the defendants executed the search warrant in an unreasonable manner, also in violation of the Fourth Amendment. Lastly, the plaintiffs bring a claim under state tort law for the intentional infliction of emotional distress and for destruction of property. The following are the facts of this case construed in a light most favorable to and making all inferences in favor of the plaintiffs.

On April 21, 1992, defendant Savage, a special agent with the Fayette County Drug Suppression Task Force (the Task Force), received a telephone call from a man who identified himself as Larry Sims. Sims also informed Savage that the plaintiff, Gordon Haygood (hereinafter G. Haygood), was a cocaine dealer. Pursuant to task force policy, Savage asked for Sims' date of birth and phone number. Savage also asked and was informed by Sims that he had never before acted as a drug informant. Savage then ran a criminal background check on Sims which came back negative.

According to its policy, the Task Force will not seek a warrant based solely on information obtained from an informant unless the informant has been shown to be reliable. The Task Force will attempt to corroborate information received from an untested informant by either surveillance or by arranging a controlled drug purchase. Savage thus called Sims to inquire about setting up a controlled buy. Sims informed Savage that G. Haygood would not sell cocaine to strangers but that he would

probably sell to Sims. Based on this information, defendant Lt. Pruitt, the supervisor of the Task Force, instructed Savage to set up a controlled buy with Sims as the purchaser. Sims was to purchase 1/8 of an ounce of cocaine (also called an "eightball") for $200.

Sergeant Rose, a Fayette County officer but not a defendant in this action, and Savage met Sims and took him to be searched prior to engaging in the attempted purchase. Rose conducted a search of Sims to determine if Sims was in possession of any money, drugs or other contraband prior to the arranged purchase. Rose searched Sims' clothing by patting him down, emptying his pockets, and checking the waist-line of his clothing. Rose's affidavit does not indicate whether or not he searched Sims' shoes and socks. During the search, Rose found a package of cigarettes and some personal papers on Sims but did not inspect them. Shortly after the search, a small audio tape recorder was placed in Sims' cigarette pack in order to record the purchase of cocaine from G. Haygood. Sims was also given $200 to purchase the eightball of cocaine which was the "going rate" for that amount of cocaine.

Sims then allegedly called G. Haygood and set up the purchase to take place at a Kwickie store at the corner of Highway 85 and Highway 314. Sims and Savage then drove to the Kwickie store to await G. Haygood. Upon arriving at the Kwickie store driving a van, G. Haygood pumped gas into his van and went inside to pay. Once inside the store, Sims approached Haygood. Sims and Haygood then went outside to Haygood's van, entered the van, and moved the van away from the gas pumps. Sims stayed in the van for a few minutes and then exited and returned to Savage's car. G. Haygood drove off. Once in the car, Sims handed Savage a baggie containing what

appeared to be cocaine. The baggie contained approximately 5 grams of white powder. The plaintiffs contend that this amount of cocaine would be considerably in excess of the approximately 3 grams that constitutes an "eightball" of cocaine and was also in excess of what Sims could have been expected to purchase for $200.

Sims was thereafter searched again. During the search, it was determined that the tape recorder was not "on" and had not recorded the transaction. Also during the search, Rose observed a piece of paper indicating that Sims' name was in fact Henry Hurston. After questioning, Sims admitted that his name was in fact Hurston and that he had given a false name to the officers. Rose reprimanded Hurston for giving the false name and paid him $100 for his role in the controlled purchase.

Savage thereafter prepared an affidavit and application for search warrant which was presented to a Fayette County magistrate judge. The magistrate judge approved the application and issued a search warrant. Pursuant to a request made in the application, the warrant contained a "no knock" provision which directed that the warrant could be executed without knocking and giving verbal notice of the officer's authority and purpose.

At approximately 11:30 p.m. on April 21, 1992, Pruitt and other officers from the Task Force executed the search warrant for the plaintiffs' home. The officers used a battering ram to break down the front door to the plaintiffs' home. The officers entered the home wearing black hoods and yelling loudly. G. Haygood was asleep in the living room at the time of the raid; he was seized, handcuffed, and detained. Plaintiff Judy Haygood (hereinafter J. Haygood) was asleep in her bedroom. Also asleep in the house were the plaintiffs' eight-year-old daughter and

eleven-year-old niece. J. Haygood and the two children were awakened and taken to the living room and detained with G. Haygood for approximately thirty minutes while the house was searched. During this time, G. Haygood was wearing only his underwear, J. Haygood and the children were wearing only nightgowns. Neither the plaintiffs nor the children were permitted to put on additional clothing during the raid and search of the house.

The plaintiffs now contend that the officers searched and ransacked their home, garage and vehicles including their personal papers, clothes, and J. Haygood's purse. The plaintiffs allege that much of their home was damaged and left in shambles and that the officers damaged their van. The plaintiffs assert that they have a videotape of their house after the raid which evidences the damage caused by the defendants' raid. The plaintiffs contend that the forced entry through the front door caused approximately $2,000 damage.

The plaintiffs contend that upon entering their home, Pruitt stated to G. Haygood: "I'm your worst nightmare!" After conducting the search and admittedly finding no evidence of drugs, drug distribution, drug use or any drug paraphernalia or evidence to indicate that the plaintiffs had engaged in any drug activities, Pruitt allegedly told G. Haygood that "they would be back!"

Discussion

The court will address the arguments made in both summary judgment motions [docket nos. 53 & 54] simultaneously as they pertain to the plaintiffs' claims and the defenses raised thereto.

Appendix C

I. Summary Judgment Standard.

Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986), the Supreme Court interpreted Rule 56(c) to require the moving party to "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portion of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Thus, the movant's burden is "discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* 477 U.S. at 325, 106 S. Ct. at 2554; *see also United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the burden on summary judgment shifts to the nonmoving party who must establish that there is a genuine material issue of fact remaining for trial. *Celotex* 477 U.S. at 325, 106 S. Ct. at 2554. The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. *Id.* The Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514 (1986), "that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." In making a determination of whether there is a material issue of

fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* 477 U.S. at 255, 106 S. Ct. at 2513; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987).

However, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2511. Similarly, a fact is not material unless it is identified by the controlled substantive law as an essential element of the nonmoving party's case. *Id.* at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof and (2) the summary judgment movant has made a plausible showing of the absence of evidence on the necessary element. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552.

II. Fourth Amendment Claims.

The plaintiffs assert that the defendants' conduct violated their rights under the Fourth Amendment to be free from unreasonable searches and seizures. Specifically, the plaintiffs allege that the raid on their home was made pursuant to a search warrant obtained without probable cause. Further, the plaintiffs contend that the defendant. executed the search warrant in an unreasonable manner also in violation of the Fourth Amendment. The defendants contend that they are entitled to summary judgment on the grounds that the warrant was supported by probable cause as a matter of law and that the warrant was executed in a reasonable manner as a matter of law.

A. Probable cause. Where, as here, the essential facts are

not in dispute, the determination of the existence of probable cause is a question of law. *Marx v. Gumbinner*, 905 F.2d 1503, 1506 (11th Cir. 1990). *See also Swint v. Wadley, Ala.*, 5 F.3d 1435, 1443 (11th Cir. 1993). "Probable cause exists when under the 'totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Swint*, 5 F.3d at 1443 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982)). The determination of probable cause is a "practical, common-sense decision" based on "all the circumstances set forth in the affidavit . . . including the veracity and basis of knowledge of persons supplying" the information. *Gates*, 462 U.S. at 238 (quotations omitted). It is the duty of the reviewing court to determine whether or not there was a substantial basis for concluding that probable cause existed. *Id.* at 238-39. This circuit embraced the *Gates* "totality of the circumstances" test in *Cauchon v. United States*, 824 F.2d 908, 911-12 (11th Cir.), *cert. denied*, 484 U.S. 957 (1987).

The undisputed record of this case reveals several factors which weigh in favor of the plaintiffs' position. At the time the defendants obtained the search warrant, they knew that the informant upon whose information they had relied had given the officers a false name. That alone should have caused the defendants to consider his claims more skeptically. Furthermore, after learning that the informant had lied about his name, it became apparent that the criminal background check that has been run earlier in the day was of little use. Yet after the defendants learned of Hurston's true name, they still neglected to run a background check on him. The record also indicates that the defendants became aware almost immediately after the controlled purchase that the recording device planted on the informant had been turned "off" prior to recording any of the alleged drug transaction. Lastly, the evidence indicates that the

informant returned from his meeting with G. Haygood with approximately 5 grams of white powder suspected of being cocaine despite the fact that, according to the officers' knowledge, the $200 dollars that they gave the informant should have only been able to purchase about 3 grams. The discrepancy in the amount of cocaine allegedly purchased by the informant compared to what the informant should have been able to purchase is another factor that weighs against a finding of probable cause.

The Fifth and Eleventh Circuits has recognized that "material omissions that were made deliberately or with reckless disregard for the truth" can be grounds for undermining a finding of probable cause. *See United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982). Other circuits have held similarly. *See Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991); *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990); *Olson v. Tyler*, 771 F.2d 277, 281 n.5 (7th Cir. 1985). The court finds that the information recited above was material to the existence of probable cause in this case and that the such information should have been made available to the magistrate judge prior to the issuance of the warrant. Defendant Savage, the affiant in support of the search warrant, failed to provide to the magistrate judge material information which would have negated probable cause had it been included in the affidavit. Evaluating the validity of the warrant in light of the omitted information, the court finds that it was not supported by probable cause. Accordingly, the defendants' motion for summary judgment is DENIED as to the plaintiffs' probable cause claim.

B. Reasonable execution. The plaintiffs next contend that the defendants violated their Fourth Amendment rights by

unreasonably executing the search warrant of their home. It appears that the plaintiffs' primary complaint is that during the execution of the warrant the defendant's broke down the front door to the plaintiffs' home without either identifying themselves, stating their purpose, or being denied entry. The defendants also appear to complain of their detention by the defendants during the time that the search was being carried out. The defendants contend that they are entitled to summary judgment on the grounds that they were justified in breaking down the door to the plaintiffs' home because the warrant contained a "no knock" provision and on the grounds that they were justified in detaining the plaintiffs and the two children during the course of the search of the home.

While it is settled that "officers executing search warrants on occasion must damage property in order to perform their duty[,] . . . . the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States,* 441 U.S. 238, 258 (1979). "Law enforcement officers having a good faith and reasonable belief in the validity of the search warrant may nonetheless incur liability under 42 U.S.C. § 1983 (1976), if the warrant is executed in an unreasonable manner." *Duncan v. Barnes,* 592 F.2d 1336, 1338 (5th Cir. 1979).

The defendants first contend that they are entitled to summary judgment as to the plaintiffs' unreasonable entry claim because the search warrant expressly permitted a no knock entry. It is undisputed that the search warrant contained a "no knock" provision. The defendants contend that the no knock provision was justified primarily because the plaintiffs' home was suspected of housing drugs and drugs, based on the officers' experience, could be easily destroyed. In his affidavit in application for the search warrant of the plaintiffs' home, Savage

stated as follows: "[t]hrough past narcotic investigations, it has been this officer's experience that controlled substances are easily disposed of and to announce affiant's identity prior to the execution of this search warrant could result in the destruction of valuable evidence and endangerment of officer's lives. Affiant prays that a no-knock provision will be included in this search warrant." (Savage statement of material facts at ¶51.) The question presented herein, therefore, is whether the inclusion of the no knock provision was constitutionally permissible.

It appears that the particular facts of this case present an issue of first impression in this circuit. Indeed, whether a no knock provision is justified based only on the fact that the warrant is for the purpose of searching for drugs is an unresolved issue in both state and federal judiciaries. *See Illinois v. Condon,* 113 S. Ct. 1359, 1360 (1993), *denying cert.*, (noting conflict among circuits and that "state courts are particularly divided over whether the presence of illegal drugs alone will justify unannounced police entry on the theory that pausing to announce the search will enable the destruction of evidence") (Rhenquist, C.J., White, J., dissenting).

Under the Fourth Amendment, no knock provisions can be warranted by the existence of exigent circumstances. *See United States v. Moore*, 956 F.2d 843, 849 (8th Cir. 1992). *See also Ker v. California,* 374 U.S. 23, 38-41, 54-55 (1963). "Exigent circumstances exist when a suspect's awareness of the search would increase the danger to police officers or others, or when an officer must act quickly to prevent the destruction of evidence." *United States v. Howard,* 961 F.2d 1265, 1267 (7th Cir.), *cert. denied*, 113 S. Ct. 236 (1992). Considering the constitutionality of a warrantless entry into a home, the Eleventh Circuit stated that

> situations in which exigent circumstances exist include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect. This circuit has recognized that the need to invoke the exigent circumstances exception is particularly compelling in narcotics cases because narcotics can be so quickly destroyed. The mere presence of contraband, however, does not give rise to exigent circumstances.

United States v. Lynch, 934 F.2d 1226, 1232 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992) (citations omitted).

There are a number of cases in which no knock entries pursuant to warrant have been upheld based on an anticipated danger to officers resulting from announcing their presence and intention. *See e.g. United States v. Singer*, 943 F.2d 758, 762 (7th Cir. 1991) (no knock entry justified based on information that defendant was armed and had made previous threats to officers; and cases cited therein); *United States v. Pearson*, 746 F.2d 787, 792 (11th Cir. 1984) (entry justified under 18 U.S.C. § 3109 when officers had "good reason to believe the house contained an enormous cache of firearms, including machine guns and submachine guns"). These decisions, however, do not control the instant case. There is no factual foundation for Savage's vague assertion in his affidavit that by identifying themselves as police officers the officers would have placed themselves in danger. And while G. Haygood is alleged to have been found with a gun on or near his person at the time of the raid, the search may

only be evaluated based on information known to the officers prior to the search. *United States v. Carter*, 566 F.2d 1265, 1269 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978) (citing *Ker*, 374 U.S. 40-41 n.12).

There being no evidence to indicate that the plaintiffs would be armed at the time of the search, the lawfulness of the no knock entry must rest solely on the fear that the plaintiffs would destroy any evidence of their alleged drug dealings if the officers were required to announce their intent to search the house prior to securing the premises. At least two circuits have rejected the adoption of a blanket rule that would permit no knock entries pursuant to warrant in all narcotic cases. *United States v. Lalor*, 996 F.2d 1578, 1584 (4th Cir.), *cert. denied*, 114 S. Ct. 485 (1993); *Moore*, 956 F.2d at 850. In *Lalor*, the criminal defendant challenged the lawfulness of the no knock raid preceding his arrest. The court considered the validity of the police's contention that the no knock entry was necessary to prevent the destruction of evidence by the defendant who was suspected of dealing drugs.

> The evidence concerning the risk of destruction of evidence was an assertion from [one of the agents] that the risk existed; the district judge's finding on this point was also based on the consideration that evidence of drug activity is quickly destroyed.
>
> The evidence concerning the possibility that the drugs would be destroyed is insufficient. There is no support for the proposition that each and every narcotics search carries a risk that evidence will be

> destroyed. Such a rule would totally eviscerate the Fourth Amendment, and could easily be expanded to include searches for any item that is easily disposed of. In this case, the police had no particularized basis for their belief that evidence would be destroyed.

Id. at 1584. In *Moore*, 956 F.2d 843, the court also indicated that a particularized showing is necessary to justify a forced entry on grounds that evidence might otherwise be destroyed. *See id.* at 850-51 (denying motion to suppress evidence seized in no knock raid based on *United States v. Leon*, 468 U.S. 897 (1984), "objective reasonable belief" standard although recognizing dubious constitutionality of raid based on assertion that drugs were "packaged for street sale" and thus easily destroyed).

In *Lynch*, 934 F.2d at 1233, the Eleventh Circuit voiced a similar position in regard to the existence of exigent circumstances justifying a warrantless raid on a house suspected of containing drugs. The court cited with approval and quoted from *United States v. Salgado*, 807 F.2d 603 (7th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988), in which the court stated that "[a] mere possibility that evidence will be destroyed . . . is not enough. Otherwise, the requirement of a warrant would have little meaning in the investigation of drug crimes." *Id.* at 609. The *Lynch* court thus concluded that "[t]o hold otherwise would render the [F]ourth [A]mendment impotent." *Lynch*, 934 F.2d at 1233.

While *United States v. Sagaribay*, 982 F.2d 906 (5th Cir.), *cert. denied*, 114 S. Ct. 160 (1993), in which the court upheld a no knock entry, arguably supports the defendants' position, several

key distinctions are present. In *Sagaribay*, police officers received a tip that the defendant was in possession of heroine inside an apartment and thus obtained a search warrant for the apartment. The warrant was served the next morning at 10:00 a.m., the officers went to the apartment, knocked on the door, announced their presence, and simultaneously opened the apartment door with a pass-key they had obtained from the landlord. *Id.* at 908. Applying the Fourth Amendment's "totality of the circumstances" test, the court held that the entry was not unreasonable despite the fact that the only exigent circumstance was the possibility that the drugs might be destroyed. *Id.* at 910. Crucial to the court's decision, however, was the fact that the intrusion into the defendants' home and privacy was minimal. The court specifically noted the following factors: the officers attempted to avoid unnecessary violence by identifying themselves as they entered the door; the officers obtained and used the pass-key to prevent unnecessary destruction of property by conducting the search during the day-time the officers minimized their intrusion on the defendants' private activities. *Id.* Because the intrusion was so limited, the court stated that "the search was reasonable even if we consider [the possibility of drug destruction] only mild exigencies." *Id.* at 910.

Based on the foregoing authority, the court finds that the defendants are not entitled to summary judgment as to the plaintiffs' claims for unreasonable execution of the search warrant. There was no evidence of any exigent circumstances other than the possibility that alleged drug evidence might be destroyed. The defendants made no particularized showing that the drug evidence which they sought to find could be easily and/or quickly destroyed. And lastly, the defendants plainly took no steps to reduce the level of intrusion into the plaintiffs' privacy. Accordingly, the defendants' motion for summary judgment is

DENIED as to the Fourth Amendment claim regarding the forced entry into their home.

The plaintiffs also assert that they were unreasonably detained by the defendants during the course of the search. Specifically, the plaintiffs complain that they were held by the defendants while dressed only in either underwear or nightgowns and were not permitted to put on additional clothing throughout the duration of the search. The Supreme Court has stated that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981). While the plaintiffs were understandably uncomfortable being detained in their night-clothes, the plaintiffs have cited no authority which supports their position that such a detention rises to the level of a constitutional violation. Indeed, *Summers*, indicates to the contrary. Assessing the interests to be considered in evaluating a detention pursuant to the execution of a search warrant, the Court noted that minimizing the risk of harm to officers is of great importance. Thus, since "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence [,] [t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03. Accordingly, the court finds that the detention of the plaintiffs during the course of the search was reasonable as a matter of law and that it was not reasonable for the defendants to prohibit the plaintiffs from having access to their rooms, closets, drawers or bathrooms for the purpose of putting on additional clothes during the search. There are no genuine issues of material fact

which remain to be determined on this issue on which the plaintiffs could prevail which would permit a recovery on this claim. Summary judgment is therefore warranted on the improper detention aspect of the Fourth Amendment claim.

In accordance with the foregoing, the defendants' motion for summary judgment as to the plaintiffs, Fourth Amendment claims is GRANTED as to the improper detention claim and DENIED as to the probable cause and unreasonable entry claims.

III. Qualified Immunity.

Under the doctrine of qualified immunity, public officials performing discretionary functions are shielded from individual liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. . . . [Thus,] immunity . . . generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987) (citations omitted). Once the defendant public official establishes that he/she "was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred . . . the burden shifts to the plaintiff to show a lack of good faith . . . by proof demonstrating that the defendant public official's actions 'violated clearly established constitutional law.'" *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990). To meet this burden, the plaintiff must prove that "[t]he contours of the right . . . [were] sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Anderson* 483 U.S. at 640. The precise conduct of the defendant need not have been ruled unlawful; rather, "in light of pre-existing law the unlawfulness must be

apparent. " *Id.* If there is no dispute as to the relevant facts, a defendant's entitlement to qualified immunity is a question of law to be decided by the court. *Ansley v. Heinrich*, 925 F.2d 1339, 1347 (11th Cir. 1991).

As the court determined above, *see supra* pp. 9-10, the affidavit supporting the search warrant of the plaintiffs' home was flawed due to material omissions which, if included in the affidavit, would have negated probable cause on the issue of qualified immunity for the affiant, defendant Savage. the question is whether the law was clearly established at the time of the incident that it is unconstitutional to recklessly omit material fact from an affidavit in support of a warrant. The court finds that it was. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court recognized the viability and set forth the procedure for challenging the validity of a warrant based on material misrepresentations contained in the supporting affidavit. Since that ruling, a number of courts have held that a warrant can be challenged based on material omissions as well as misrepresentations. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990) (" it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause"; and cases cited therein). *See also West Point-Pepperell Inc.*, 689 F.2d at 959. The court finds as a matter of law that the omissions were material and that Savage recklessly failed to include the information in his affidavit in support of the warrant. Accordingly, he in not entitled to summary judgment as to this claim on the grounds of qualified immunity. *See Stewart*, 915 F.2d at 582-83.

As to the remaining individual defendants, the facts are

undisputed and the court finds that they played no part in the reckless omissions in the search warrant affidavit. Furthermore, the search warrant was facially valid and an objectively reasonable officer charged with executing it could have believed that it was supported by probable cause. Accordingly, their conduct is protected by qualified immunity. *See Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991) (no qualified immunity for officer who made material misrepresentation to obtain warrant but officers who executed the warrant were entitled to qualified immunity because warrant facially valid).

In regard to the execution of the search warrant, the plaintiffs have failed to establish that the defendants' conduct violated the plaintiffs' clearly established constitutional rights. It is apparent from the court's discussion above regarding the breaking down of the door to the plaintiffs' home, *see supra* pp. 10-17, that the law on this issue is, if not entirely unsettled, at least not clearly established. It therefore cannot be said that the defendants violated the plaintiffs' clearly established rights when they initiated their search of the plaintiffs' home by breaking down the front door. Accordingly, the individual defendants are entitled to qualified immunity on this issue.

The individual defendants are also entitled to qualified immunity as to the plaintiffs' Fourth Amendment claim for unreasonable detention during the conduct of the search. As the court noted above, *see supra* pp. 17-18, the Supreme Court has recognized the strong interest in permitting police officers to have total control of a premises during the execution of a search warrant. *Summers*, 452 U.S. at 702-03. The plaintiffs have failed to come forward with any authority suggesting, much less establishing, that the detention of the plaintiffs in their nightclothes violated the plaintiffs' clearly established constitutional rights.

Appendix C

In accordance with the foregoing, the defendants' motion for summary judgment based on qualified immunity is DENIED as to defendant Savage in regard to the probable cause claim; the motion is GRANTED as to the plaintiffs' probable cause claims against the remaining individual defendants and as to the plaintiffs' other federal claims (unreasonable entry and improper detention) as to all three individual defendants.

IV. Municipal Liability

Aside from Fayette County, the plaintiffs have also named Johnson, Pruitt and Savage as defendants in their official capacities. Johnson is the Sheriff of Fayette County; Pruitt is an officer in the Fayette County Sheriff's department; Savage is sued in his capacity as an employee of the Fayette County sheriff's department. (Complaint at ¶¶ 3 & 5.) "Official capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quotes omitted). "[T]hus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id.* at 166. In accordance with this authority, the court will consider the plaintiffs' claims against Johnson, Pruitt and Savage in their official capacity and the claims against Fayette County simultaneously.

The defendants' entire argument on the issue of municipal liability is essentially that "it is the policy and custom of the Fayette County Sheriff's Department to conduct searches, and/or to seek the issuance of search warrants, only in situations

where there is probable cause to believe that fruits, instrumentalities, or evidence of crime will be found. Thus, . . . [the plaintiffs' rights] were not violated as a result of any policy, practice, or custom of the County (Def. brief [docket no. 54] at 45.) These assertions are not sufficient to warrant summary judgment on this issue.

Under *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-127 (1988), a municipality may be held liable for the actions of officials who have "final policymaking authority," *Id.* at 123. It is also well established that a municipality can be held liable for a "practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.' " *Id.* at 127. Thus, a municipality can be liable for the conduct of an officer who is not the ultimate source of authority if the officer was acting pursuant to a municipal custom or policy. *See City of St. Louis*, 485 U.S. at 127; *Parker v. Williams*, 862 F.2d 1471, 1477-78 (11th Cir. 1989). Given this authority, the defendants have not established the lack of evidence to support the plaintiffs' case on this issue. Further, the defendants have failed to show, as a matter of law, that the unlawful entry into the plaintiffs' home was not made pursuant to county policy or was not undertaken at the direction of a county officer with final decisionmaking authority. The defendants have also failed to prove as a matter of law that the search warrant was obtained neither in accordance with county policy nor at the direction of a county officer with final decisionmaking authority. Accordingly, the defendants' motion for summary judgment is DENIED as to the plaintiffs' claims against Fayette County and against Johnson, Pruitt and Savage in their official capacities.

V. State Law Claims. In addition to their federal claims,

the plaintiffs also bring pendent state tort claims against the defendants. The defendants seek summary judgment as to the state tort claims against the individual defendants on the grounds of official immunity. The defendants also seek summary judgment as to the state tort claims against Fayette County on the grounds of sovereign immunity.

As an initial matter, the plaintiffs' responsive pleadings do not address and thus do not oppose the defendants' assertion that Fayette County is entitled to summary judgment on the grounds of sovereign immunity. Accordingly, the motion for summary judgment is GRANTED as unopposed as to the plaintiffs' state tort claims against Fayette County. In the alternative, the court finds that summary judgment is also warranted on the merits. *See* Ga. Const. art. 1, § 2, ¶ 9 (1991).

The remaining individual defendants assert that they are entitled to summary judgment as to the state tort claims on the grounds of official immunity. The plaintiffs seek to recover from these defendants for intentional infliction of emotional distress and damage to property. (Complaint at ¶ 24.) Under the Georgia Constitution, art. 1, § 2, ¶ 9 (1991), "all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damage . . . if they act with actual malice or with actual intent to cause injury in the performance of their official functions." *Id.* at ¶ 9(d). There are four elements to the tort of intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the emotional distress and the defendants' conduct; (4) the emotional distress must be severe. *Hendrix v. Phillips*, 207 Ga. App. 394, 395, 428 S.E.2d 91 (1993). Furthermore, "[i]n order to warrant recovery the conduct

also must be of such serious import as to *naturally* give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress." *Cooler v. Baker,* 204 Ga. App. 787, 788, 420 S.E.2d 649 (1992) (emphasis in original). The question of "[w]hether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law. *Yarbray v. Southern Bell Telephone & Telegraph Co.*, 261 Ga. 703, 706, 409 S.E.2d 835 (1991).

The court finds that summary judgment is warranted on the grounds that the plaintiffs have failed to adduce evidence indicating that the officers acted with the requisite level of intent or that the plaintiffs suffered from severe emotional distress as a result of the conduct. Virtually all of the actions complained of by the plaintiffs were directly related to the defendants' interest in executing the search warrant in a safe environment free from any potential interruptions or attempts to flee or destroy evidence. Notwithstanding the fact that the court has found the defendants' forced entry into the plaintiffs' home unjustified, the plaintiffs have not produced any evidence that the defendants' conduct was motivated by anything other than the desire to carry out their law enforcement functions safely and effectively. The only conduct which is not attributable to the law enforcement purposes involved in the search were the alleged comments made to G. Haygood by one of the officers conducting the search. The court finds as a matter of law that these comments did not cause such severe emotional distress as to warrant a recovery under this claim. Accordingly, the defendants are entitled to summary judgment as to the plaintiffs' intentional infliction of emotional distress claims.

The plaintiffs also appear to assert a state tort claim for

damage to personal property. The only personal property mentioned in the plaintiffs' complaint is the front door to their home which was broken down at the initiation of the search by the defendants. It is uncontroverted that the search warrant obtained by the defendants authorized the no knock entry. Although the court has determined that the no knock entry was unlawful, that determination is not dispositive of the issues presented by the plaintiffs' state tort claims. As was stated above, the individual defendants are entitled to official immunity from state tort claims unless they acted with "actual malice or with actual intent to cause injury in the performance of their official functions." Ga. Const. art. 1, § 2, ¶ 9(d) (1991). Because the no knock entry was expressly authorized by the warrant, the court finds as a matter of law that the damage to the plaintiffs' door was not caused by the malicious actions of the defendants. The individual defendants are therefore entitled to summary judgment as to the property damage claims.

In accordance with the foregoing, the individual defendants' motion for summary judgment as to the plaintiffs' state tort claims is GRANTED.

VI. Plaintiff's Motion to Compel or Strike.

The plaintiffs seek an order compelling defendant Savage to submit to a second deposition subsequent to the close of discovery or, in the alternative, that Savage's answer be stricken and default judgment be awarded to the plaintiffs. The record indicates that the plaintiffs took the deposition of Savage on April 9, 1993. The transcript of the deposition indicates that, after a somewhat heated exchange between attorneys, the plaintiffs' attorney voluntarily concluded the deposition of Savage. (Savage depot at 78-79.) Furthermore, the instant

motion to compel is not timely under Local Rule 225-4(d), NDGa. Accordingly, the motion to compel is DENIED.

There is no indication that Savage has behaved in any manner that would warrant sanctions under Fed. R. Civ. P. 37. Accordingly, the motion for sanctions is DENIED.

Summary

The plaintiffs' motion to strike answer, compel discovery and enter default [docket no. 52] is DENIED.

The defendants', Fayette County, Mike Pruitt, Randall Johnson and Scott Savage, motions for summary judgment [docket nos. 53 & 54] are GRANTED in part and DENIED in part.

> The motions are DENIED as to the plaintiffs' § 1983 claim for violation of the Fourth Amendment due to the absence of probable cause in support of the search warrant and due to the break-down of the front door to the plaintiffs' home during the execution of the search warrant. The motion is DENIED as to Fayette County's (as well as Johnson, Pruitt and Savage in their official capacities) assertion that it is not subject to municipal liability as a matter of law. The motion is also DENIED as to defendant Savage's assertion of qualified immunity as to the plaintiffs' claim for the absence of probable cause in support of the search warrant.

Appendix C

The motions are GRANTED as to the plaintiffs' remaining federal and state law claims and as to Johnson and Pruitt's assertions of qualified immunity as to all claims and as to Savage's assertion of qualified immunity as to the unreasonable entry and improper detention claims only.

SO ORDERED, this 16 day of February, 1994.

s/ G. Ernest Tidwell
ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D — AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT DATED APRIL 21, 1992

AFFIDAVIT AND APPLICATION
FOR SEARCH WARRANT
OF
FAYETTE COUNTY, GEORGIA

The undersigned SPECIAL AGENT SCOTT SAVAGE, being duly sworn, deposes and says:

I am an officer of the State of Georgia or its political subdivisions charged with the duty of enforcing the criminal laws, and that I have reason to believe that in FAYETTE COUNTY, GEORGIA, on the person, premises or property described as follows: (state detailed description of person, property or location).

THE HAYGOOD RESIDENCE LOCATED AT 235 DEVILLA TRACE FAYETTEVILLE, GEORGIA LOCATED IN FAYETTE COUNTY. MORE SPECIFICALLY DESCRIBED AS A GRAY SINGLE STORY WOOD SIDED STRUCTURE WITH THE NUMBERS "235" CLEARLY DISPLAYED ON THE MAILBOX. ANY VEHICLES, OUT BUILDINGS OR PERSONS LOCATED ON THE PROPERTY AT 235 DEVILLA TRACE FAYETTEVILLE, GEORGIA.

there is now located certain instruments, articles, person(s) or things, namely: (specify evidence, contraband or person(s) to be searched for):

COCAINE AND EVIDENCE OF IT'S SALE, USAGE AND DISTRIBUTION.

which is in violation of (state the law(s) which are being violated):

Appendix D

O.C.G.A. 16-13-30 VIOLATION OF GEORGIA CONTROLLED SUBSTANCE

the facts tending establish probable cause that a crime has been, or is being committed and the above described instruments, articles or things described above are presently located at the above described premises or property are as follows: (state in detail the facts you believe create probable cause):

AFFIANT STATES THAT AFFIANT IS A SWORN AND CERTIFIED PEACE OFFICER IN THE STATE OF GEORGIA. AFFIANT FURTHER STATES THAT AFFIANT IS EMPLOYED BY THE TYRONE POLICE DEPARTMENT AND HAS BEEN FOR THE PAST YEAR. AFFIANT STATES THAT AFFIANT IS CURRENTLY ASSIGNED TO THE FAYETTE COUNTY SHERIFF'S DRUG SUPPRESSION TASK FORCE WITH THE RESPONSIBILITY OF INVESTIGATING NARCOTIC RELATED CRIMES IN FAYETTE AND SURROUNDING COUNTIES.

s/ illegible	s/a s/Scott Savage
MAGISTRATE JUDGE	AFFIANT

ON APRIL 21, 1992 AFFIANT WAS CONTACTED BY A CONFIDENTIAL INFORMANT (C.I. #123) WHO STATED TO AFFIANT THAT A MALE KNOWN TO C.I. #123 AS GORDON "SHORTY" HAYGOOD WOULD SELL C.I.#123 A QUANTITY OF COCAINE.

AT APPROXIMATELY 8:24 P.M. ON APRIL 21, 1992 C.I. #123 AND AFFIANT ARRIVED AT THE KWICKIE STORE LOCATED ON HIGHWAY EIGHTY-FIVE IN

FAYETTEVILLE, GEORGIA. AT THAT TIME C.I. #123 EXITED AFFIANT'S VEHICLE AND ENTERED THE KWICKIE STORE. THERE C.I. #123 MET WITH A SHORT WHITE MALE AND EXITED THE STORE. THE MALE AND C.I. #123 ENTERED A FORD AEROSTAR VAN GEORGIA TAG NUMBER PLG-314 AND PULLED TO THE NORTH SIDE OF THE STORE AND PARKED. AT APPROXIMATELY 8:36 P.M. C.I. #123 EXITED THE VAN AND RETURNED TO AFFIANT'S VEHICLE.

AFTER THE MEETING WITH C.I. #123, SPECIAL AGENT MICHELLE WALKER AND LT. MIKE PRUITT OF THE FAYETTE COUNTY SHERIFF'S DRUG SUPPRESSION TASK FORCE FOLLOWED THE VAN WITH THE WHITE MALE DRIVER TO 235 DEVILLA TRACE IN FAYETTEVILLE, GEORGIA. 235 DEVILLA TRACE WAS THE SAME LOCATION THAT SGT. KEN ROSE OF THE FAYETTE COUNTY SHERIFF'S DRUG SUPPRESSION TASK FORCE HAD FOLLOWED THE VAN AND THE WHITE MALE FROM PRIOR TO THE MEETING AT THE KWICKIE STORE.

C.I. #123 HAD BEEN SEARCHED PRIOR TO THE BUY AND AFTER THE TRANSACTION HAD TAKEN PLACE. C.I. #123 BOUGHT APPROXIMATELY FIVE (5) GRAMS OF A WHITE POWDER SUSPECTED TO COCAINE FROM THE MALE KNOWN TO C.I. #123 AS GORDON HAYGOOD FOR TWO HUNDRED DOLLARS.

ON APRIL 21, 1992 S/A MICHELLE WALKER CHECKED WITH THE FAYETTE COUNTY VEHICLE TAG RECORDS AND FOUND THAT GEORGIA TAG NUMBER PLG-314 WAS REGISTERED TO GORDON HAYGOOD AT 235 DEVILLA TRACE IN FAYETTEVILLE, GEORGIA.

Appendix D

ON APRIL 21, 1992 S/A WALKER CHECKED WITH THE FAYETTE COUNTY TAX ASSESSORS OFFICE AND FOUND THAT THE RESIDENCE LOCATED AT 235 DEVILLA TRACE IS OWNED BY GORDON HAYGOOD.

THROUGH PAST NARCOTIC INVESTIGATIONS, IT HAS BEEN THIS OFFICER'S EXPERIENCE THAT CONTROLLED SUBSTANCES ARE EASILY DISPOSED OF AND TO ANNOUNCE AFFIANT'S IDENTITY PRIOR TO THE EXECUTION OF THIS SEARCH WARRANT COULD RESULT IN THE DESTRUCTION OF VALUABLE EVIDENCE AND ENDANGERMENT OF OFFICER'S LIVES. AFFIANT PRAYS THAT A NO-KNOCK PROVISION WILL BE INCLUDED IN THIS SEARCH WARRANT.

I swear or affirm that all of the information contained in this affidavit and all other testimony given by me under oath is true to the best of my knowledge and belief.

s/ Scott Savage
AFFIANT

S/A s/ Scott Savage
TITLE

sworn to and subscribed to before me this 21 day of April, 1992, at 10:35P.

s/ illegible
JUDGE OF MAGISTRATE COURT
FAYETTE COUNTY
GEORGIA

Appendix D

SEARCH WARRANT
IN THE MAGISTRATE COURT OF FAYETTE COUNTY
STATE OF GEORGIA

TO: ALL PEACE OFFICERS OF THE STATE OF GEORGIA

affidavit having been made before me by SPECIAL AGENT SCOTT SAVAGE, an officer charged with the duty of enforcing the criminal laws, that he has reason to believe that in FAYETTE COUNTY, GEORGIA on the following described person, premises or property: (state detailed description of person, property or location):

THE GORDON HAYGOOD RESIDENCE LOCATED AT 235 DEVILLA TRACE FAYETTEVILLE, GEORGIA LOCATED IN FAYETTE COUNTY. MORE SPECIFICALLY DESCRIBED AS A GRAY SINGLE STORY WOOD SIDED STRUCTURE WITH THE NUMBERS "235" CLEARLY DISPLAYED ON THE MAILBOX. ANY VEHICLES, OUT BUILDINGS OR PERSONS LOCATED ON THE PROPERTY AT 235 DEVILLA TRACE IN FAYETTEVILLE, GEORGIA.

there is now located certain instruments, articles, person(s) or things, namely: (specify evidence, contraband of person(s) to be searched for):

COCAINE AND EVIDENCE OF IT'S SALE, USAGE AND DISTRIBUTION.

which is in violation of (state the law(s) which are being violated):

Appendix D

O.C.G.A. 16-13-30 VIOLATION OF GEORGIA CONTROLLED SUBSTANCE ACT.

based upon the affidavit given under oath or affirmation and all other evidence given to me under oath or affirmation, I am satisfied that there is probable cause to believe that a crime is being committed or has been committed and that the property described above is presently located on the person, premises or property described above.

you are hereby commanded to enter, search and seize within ten (10) days of this date, the person(s), premises or property described above. A copy of this warrant is to be left with the person to be searched, or if no person is available, on the premises or vehicle searched, and with a written return, including an inventory of any things seized, shall be made before me or a court of competent jurisdiction without unnecessary delay after the execution of this search warrant.

so ordered this 21 day of April, 1992 at 10:30 P

s/ illegible
JUDGE OF THE MAGISTRATE COURT
FAYETTE COUNTY, GEORGIA

Appendix D

NO-KNOCK PROVISION
(not valid unless signed)

it appearing from the aforementioned affidavit that there are reasonable grounds to believe that the giving of verbal notice would greatly increase the officer's peril and/or lead to the immediate destruction of the evidence or contraband ordered to be seized.

it is, therefore, ordered that entry be made without knocking and the giving of verbal notice of the officer's authority and purpose.

so ordered this 21 day of April, 1992 at 10:30 pm

s/ illegible
JUDGE OF THE MAGISTRATE COURT
FAYETTE COUNTY, GEORGIA

RETURN OF SERVICE

[ ] this search warrant was not executed and is returned to the judicial officer who issued it.

[x] I executed this search warrant of the 21 day of April, 1992, at 11:39 PM and searched the person, premises or property described in the warrant.

a copy of this warrant:

[x] was left with s/ Gordon L. Haygood

[ ] was left in the following conspicuous place: _____ because no one was available to be given the warrant.

Appendix D

attached hereto is an inventory consisting of 0 pages of the instruments, articles or things which were seized pursuant to this search warrant. This inventory was made in the presence of _____ and I swear that this inventory is a true and detailed account of all items seized pursuant to this search warrant.

S/A s/ Scott Savage
AFFIANT

sworn to and subscribed to before this ___ day of _____ 19__ at _____

JUDGE OF THE MAGISTRATE COURT
FAYETTE COUNTY
STATE OF GEORGIA

Supreme Court, U.S.
FILED
SEP 19 1996
CLERK

No. 96-280

In The

Supreme Court of the United States

October Term, 1995

GORDON HAYGOOD and JUDY HAYGOOD,

Petitioners,

vs.

SCOTT SAVAGE, in his individual and official capacity as a law enforcement officer with the Fayette County Sheriff's Department,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED

Whether the Petition meets the requirements of Supreme Court Rule 10 governing *certiorari* when the Eleventh Circuit Court of Appeals has found that the omission of certain facts from an affidavit given by a law enforcement officer to obtain a search warrant was neither material nor violative of clearly established law, thereby affording qualified immunity to the officer?

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OPINIONS BELOW

Opinions were issued in this case by the United States District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals. The Eleventh Circuit opinion is reported at 70 F.3d 92 (11th Cir. 1995). The Eleventh Circuit also later denied Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*. Each opinion and ruling is attached to Petitioners' Petition for Writ of *Certiorari* as appendices.

STATUTORY PROVISION INVOLVED

Petitioners have cited the relevant statutory provision involved.

I. STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of *Certiorari* on the grounds that the Petitioners failed to address the issue of qualified immunity with which the Eleventh Circuit Court of Appeals was solely concerned in this case. Instead, Petitioners seek *certiorari* for the advancement of a proposition that was settled by this Court almost twenty years ago in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). Specifically, the Petition advances only the general principle that false search warrant affidavits and affidavits from which *material* facts are deliberately omitted are violative of the Fourth Amendment to the United States Constitution. For this reason

alone, this Court's consideration on *certiorari* is completely unnecessary.

Although not precisely stated, Petitioners appear also to claim that a reasonable police officer should never omit *any* fact when seeking a search warrant from a magistrate. This argument ignores the "materiality" element of the *Franks, supra,* rationale.

Unfortunately, these arguments are not germane to the Eleventh Circuit's decision in this case. The Eleventh Circuit's decision was singularly concerned with the issue of qualified immunity. As such, the Eleventh Circuit carefully analyzed the facts in the context of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982) and its progeny. Petitioners do not contend the Eleventh Circuit employed the wrong analysis or improperly interpreted this Court's decisions on the issue of qualified immunity. That analysis, as discussed herein, specifically rejects reliance upon the general constitutional principles, as advanced by Petitioners.

The Eleventh Circuit conducted a *de novo* qualified immunity analysis. It properly examined the specific facts and pre-existing law in order to determine whether an objectively reasonable law enforcement officer would have known his actions were violative of the United States Constitution. As such, the holding is extremely fact-specific and limited. Consequently, the Eleventh Circuit's decision has minimal application to disparate factual situations.

A. Statement of Facts

The Opinion of the Eleventh Circuit Court of Appeals correctly sets forth the facts of this case. The Eleventh Circuit Court of Appeals conducted a *de novo* review of the facts of the case and, in its Opinion, outlined the facts surrounding the controlled drug buy, the facts supporting the Officer's affidavit, and those omitted from the affidavit. Thus, in the interest of efficiency, Respondent respectfully directs the Court's attention to the Eleventh Circuit's Opinion attached to Petition for Writ of *Certiorari* as Appendix B. *See also, Haygood v. Johnson, et al.*, 70 F.3d 92, 93-94 (11th Cir. 1995).

B. Misstatements of Fact

Pursuant to United States Supreme Court Rule 15.1, Respondent brings to the Court's attention the following misstatements of fact contained in the Petition.

Contrary to Petitioners' assertion, informant Hurston had not previously been engaged by the police in fraudulent controlled buys by the county or the Drug Task Force which employed Respondent. It is true Hurston had been so involved in other jurisdictions, but Respondent did not know this prior to the execution of the warrant.

Second, Petitioners' reference to Respondent's knowledge prior to obtaining the search warrant is incorrect. *See* Petition, p. 5. Before he applied for the search warrant, Respondent was not aware of the fact that the substance purportedly purchased by the informant weighed more than an "eight ball." In fact, qualifying his statement with the fact that drug transactions are not

typically precise and scientific in nature, Respondent testified that the quantity looked like an "eight ball" to him.

Third, the criminal background check Respondent conducted on the informant was not "inconclusive" as Petitioners state. Rather, Respondent checked and found no criminal history for the informant.

Last, the Eleventh Circuit conducted a *de novo* review of the facts and law in this case. Accordingly, Petitioners' repeated reference to the facts set forth in the District Court's Opinion is improper.

II. REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners contend that the Eleventh Circuit Opinion is far-reaching and has a negative effect upon the Fourth Amendment. It is in reality, however, a limited and fact-specific decision. The Court's holding is a literal interpretation of the meaning of "clearly established law" under *Harlow v. Fitzgerald, supra,* in the context of the specific facts of this case.[1]

The Eleventh Circuit merely held that where a law enforcement officer's affidavit in support of a search warrant following an apparently flawless controlled drug buy omits the fact that the informant initiating the buy

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[1] As this Court is well aware, the purpose of qualified immunity is to shield government officials exercising discretionary functions from civil damages when their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known. *Harlow,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2731 (1982) (emphasis added).

used an alias, the tape recorder appeared to have malfunctioned, and the purchase procured two grams more of cocaine than expected, was not clearly contrary to clear, pre-existing, and established law. This being the case, the Eleventh Circuit opined that a reasonable officer standing in the shoes of Respondent would not have known he was violating Petitioners' constitutional rights.

Additionally, a plain reading of various portions of the decision make it clear that the Eleventh Circuit did not view its decision as having far-reaching, precedential value. It contains no sweeping platitudes, but merely deals with the three small factual omissions from a warrant affidavit in the context of the standard for evaluating qualified immunity. Discussed *infra*.

Specifically, the Eleventh Circuit stated:

> The district did not conclude (nor could it rightly have) that Plaintiff met the burden of showing that, *in light of pre-existing law,* the facts omitted were clearly material (that is, that the facts omitted clearly would have negated probable cause if those facts had been included). We, looking at the pre-existing law, hold that the facts omitted here were not so clearly material that every reasonable law officer would have known that their omission would lead to a search in violation of federal law.

Haygood v. Johnson, 70 F.3d 92, 95 (11th Cir. 1995).

The Eleventh Circuit then discussed the specific omissions. According to the Circuit Court, Hurston "had used an alias, that the tape recorder had shut off, and that the quantity of cocaine allegedly purchased exceeded the expected quantity by about fifty percent." *Id.* at 94. The

Court merely held that these facts considered either alone or in combination "might be insufficient to negate probable cause in these uncommon and specific circumstances" due to the fact that Respondent witnessed a "typical drug deal" "by all appearances." *Id.* The Eleventh Circuit properly concluded that there were no pre-existing decisions from Georgia, the Eleventh Circuit, or the present Court that were similar to the facts in this case. Thus, there was no clearly established law which was violated for purposes of the qualified immunity analysis.

The Eleventh Circuit analyzed the factual omissions and concluded that such omissions did not vitiate probable cause. It further concluded that the law was not established that the omissions were so material that a reasonable officer would know he was violating constitutional rights and thereby lose entitlement to qualified immunity.

Petitioners do not even address the Eleventh Circuit's analysis of the qualified immunity issue. Instead, Petitioners advance the general rule of law with respect to search warrant applications. The issue here is not generally whether police officers may present false affidavits or withhold material information from affidavits. As discussed below, the pertinent inquiry is whether Respondent is entitled to qualified immunity based upon the specific facts in light of the clearly established law as it existed at the time the warrant issued.

A. The Eleventh Circuit's Decision Follows the Directives of This Court.

Petitioners claim the Eleventh Circuit erred by creating a conflict with this Court, itself and other jurisdictions. Specifically, Petitioners argue error because the law was "clearly established" that material omissions from warrant affidavits may violate the Fourth Amendment. Respondent does not quarrel that this was and is the law. However, that is not the pertinent inquiry for purposes of the qualified immunity analysis.

Petitioners are incorrect in their contention that the "clearly established right or law" at issue in the qualified immunity analysis is a general one – the right to be free from searches lacking in probable cause. Certainly, the existence of the Fourth Amendment to the United States Constitution establishes this general "right." However, this is not "clearly established law" to which *Harlow v. Fitzgerald, supra,* and its progeny refer.

The "clearly established" law which would deprive Respondent of his right to qualified immunity is that which is so specific and clear that a reasonable officer standing in the shoes of Respondent would have known he was violating the Fourth Amendment. The "objective reasonableness" standard established by this Court was intended to allow the issue of qualified immunity to be decided as a matter of law.

The doctrine of qualified immunity is intended to afford broad qualified immunity protection to all "unless the government agent's acts are so obviously wrong in light of pre-existing law that only the plainly incompetent or those who knowingly violate the law would have done

such a thing." Otherwise, the government agent is immune from suit. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). This means that "government agents are not always required to err on the side of caution," *Davis v. Scherer*, 468 U.S. 183, 196, 104 S.Ct. 3012, 3020 (1984), for this could have a chilling effect on law enforcement.

In *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986), this Court examined the "reasonableness" standard specifically in the context of warrants. The *Malley* decision states: "only where the warrant application is so lacking in indicia of probable cause as to render the official's belief in its existence unreasonable will the shield of immunity be lost." *Malley*, 475 U.S. at 345, 106 S.Ct. at 1098. The court in *Malley* further stated that when officers have a search warrant, the officers will lose "the shield of immunity" *only* "if, on an *objective* basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* 475 U.S. at 341, 106 S.Ct. at 1096.[2]

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[2] On the issue of probable cause, this Court has stated:

> "It is inevitable that law enforcement officials will be in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials . . . should not be held personally liable." *Anderson v. Creighton*, 438 U.S. 632, 641, 107 S.Ct. 3034, 3040 (1987).

More important to the issue in this case is the interpretation of the *Harlow* requirement that the acts be violative of "clearly established law." This Court explained the rule in *Anderson v. Creighton*, 438 U.S. 632, 107 S.Ct. 3034 (1987). In order for a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 438 U.S. at 640, 107 S.Ct. at 3039 (1987).

For the law to be clearly established to the point that qualified immunity does not apply, the law must have been *earlier* developed in such a concrete way to make it obvious to all reasonable actors in the defendant's place, that what he is doing violates federal law. *Id.* Thus, under the definition of "reasonableness" dictated by *Malley* and the "clearly established law" described by *Anderson*, the qualified immunity analysis is an objective formulation which requires not only the determination of the protected right, but also a decision of how particularly the right must be specifically stated.

In fact, the *Anderson* decision addresses the specific problem with Petitioners' analysis. In *Anderson*, this Court directed that courts must not permit plaintiffs to discharge their burden[3] by referring to general rules and to the violation of abstract rights. *Id.* at 639-41, 107 S.Ct. 3038-39. (Even though the general right allegedly violated – the right to be free from warrantless searches without

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[3] Once defense of qualified immunity is raised, plaintiffs bear the burden of showing their federal rights were clearly established. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 100 S.Ct. 2086, 2816 (1985).

probable cause – was clearly established, lower court should have considered whether the circumstances with which defendant was confronted did not constitute probable cause.)

The Eleventh Circuit analyzed Respondent's entitlement to qualified immunity in this case in light of its recent decision in *Lassiter v. Alabama A&M University*, 28 F.3d 1146 (11th Cir. 1994) wherein the court provided clarification of the standards explained by this Court in *Harlow*, *Anderson*, and *Malley*. In keeping therewith, the Eleventh Circuit focused on the actual, on the specific, and on the details of the concrete cases. It held here that the law was not clearly established such that every reasonable officer would have known that in this witnessed controlled buy situation, the three omitted facts were material such that their omission from the affidavit was so "obviously wrong" so as to deprive Respondent from entitlement to qualified immunity. *Haygood v. Johnson*, *supra*. The Eleventh Circuit properly noted that there are no cases which would have established a "bright line" standard at the time of the application for the search warrant. Therefore, a reasonable police officer not on notice that the facts omitted from the affidavit were material omissions or, if included, would negate probable cause.[4]

Last, the cases relied upon by Petitioners on the issue of "clearly established" law are not applicable and create no conflict with the Eleventh Circuit's opinion below. For

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[4] There is abundant case law supporting Respondent's actions. (See discussion *infra*.)

example, *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), the landmark case on the issue of challenging the validity of a warrant, is not in conflict with the Eleventh Circuit's decision. *Franks* stands for the proposition that when false statements are present in a warrant (which is not alleged here), the warrant is subject to further scrutiny by way of hearing.

West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950 (11th Cir. 1982) is not analogous. That case involved an administrative OSHA search. The Eleventh Circuit held that the claimant had not offered proof of intentional or reckless omissions from the affidavit and thus was not entitled to a *Franks* hearing. *Id.* at 959.

United States v. Martin, 615 F.2d 318 (5th Cir. 1980) also stands for the proposition that in order to vitiate a warrant there must be evidence of deliberate falsehood. Negligence is insufficient. *Id.* at 329.

In sum, Petitioners miss the point. The law must have been clearly established such that Respondent would have known that the three omissions were material despite the fact that he witnessed what appeared to be a legitimate and typical drug transaction. Moreover, Petitioners did not meet their burden of proving that the omitted facts were material to the determination of probable cause. Consequently, Respondent is entitled to qualified immunity.

Additionally, Petitioners cite no case which is analogous or which indicates that the law was such that every reasonable law enforcement officer should have known that to omit these facts would be violative of Petitioners' constitutional rights. Likewise, Petitioners cite no case

which says that these omitted facts, if added to the affidavit, would negate probable cause.

Accordingly, the Eleventh Circuit utilized the proper analysis and reached the right conclusion. Respondent is entitled to qualified immunity.

B. The Clearly Established Law Supported Respondent's Acts.

Although not specifically addressed in the Eleventh Circuit opinion, it is also important to note that the clearly established law at the time actually supported Respondent's act with respect to the warrant. In this case, the controlled buy specifically established probable cause. Although this Court has never addressed the issue, it is well established that controlled buys are an approved method of establishing probable cause particularly when the credibility of information received by law enforcement officials from informants is in question. *See, United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992) ("If there is any doubt about the reliability of [information involving illegal drug transactions], the police can limit their response to surveillance or engage in 'controlled buys'.").

In fact, courts have universally found probable cause based on controlled buys similar to the one in the instant case. For example, in *United States v. Cook*, 949 F.2d 289 (10th Cir. 1991), the court found probable cause to search defendant's apartment based on a controlled buy that was quite similar to the controlled buy in the instant case:

> The confidential informant offered to participate in a controlled buy of cocaine at the apartment. Officer McCrory searched the informant for money and drugs, and upon ascertaining that he had neither, gave him twenty dollars and watched him enter Mr. Cook's apartment. Upon the confidential informant's return, Officer McCrory again searched him for money and drugs. Officer McCrory did not find the twenty dollars, but he did find a white rock that appeared to be cocaine.

Id. at 292. In the *Cook* case, the court found that probable cause to search Mr. Cook's apartment was present even though the substance bought by the confidential informant was not tested prior to seeking the search warrant. *Id.* at 293. *See, United States v. Carty*, 993 F.2d 1005 (1st Cir. 1993).

In *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993), a police detective received information from an informant that drug trafficking was being conducted from the second floor apartment on a particular street. *Id.* at 1166. To corroborate this information, the detective executed a "controlled buy," using an informant. *Id.* The informant was searched for contraband, then given a sum of money. The detective watched as the informant entered the building, then exited from the same door a few minutes later. The informant handed the detective a quantity of cocaine, and the detective again searched the informant. *Id.* at 1166-67. The detective then obtained a search warrant for the second story apartment. *Id.* at 1162. The criminal defendant argued that there was no probable cause to execute the search. The court explained the criminal defendant's argument against probable cause as follows:

> Defendant argues that the affidavit is inadequate because the detective failed to establish the reliability of the confidential informant. . . . Detective Zammarelli confirmed the information with which the confidential information provided him by carrying out a "controlled buy". Given its greatest force, defendant's argument against this corroboration was that one and the same informant was the source of the information and the actor in the "controlled buy", and that the informant might have stashed cocaine elsewhere in the building out of sight of the detective. This possibility, defendant posits, undercuts the reliability of the informant.

Id. at 1167. The court flatly rejected this argument, stating that, "[a]lthough defendant's argument is possible, it is not probable and strains credulity". *Id.* The court, therefore, held there was probable cause to believe that cocaine was being sold from the apartment. *Id.*

In essence, what happened here is that the officers corroborated an untested informant's information that Petitioner Gordon Haygood was selling cocaine by witnessing what certainly appeared to be a classic drug transaction. Thus, the case law establishes that this fact situation established probable cause to believe that Petitioners were, in fact, selling cocaine, a fact recognized by the Eleventh Circuit in this case.

In *United States v. Robinson*, 756 F.2d 56 (8th Cir. 1985), the court held that an informant's statement that Mr. Robinson was selling marijuana from his apartment was "corroborated" by officers' observation of "persons going to Robinson's door and making exchanges of

unknown items". *Id.* at 59-60. In *United States v. McFarland*, 633 F.2d 427 (5th Cir. 1980), the court found that there was probable cause to arrest a criminal defendant when a man got into the defendant's car, "apparently empty-handed", and then left the car several minutes later carrying a package containing cocaine. *Id.* at 429. Similarly, in the instant case, the fact that an informant got into plaintiff's vehicle "apparently empty-handed" and left the vehicle with a substance appearing to be cocaine established probable cause to search plaintiff's residence. *See also, United States v. Smith*, 914 F.2d 565 (4th Cir. 1990) (court found probable cause where "the informant was observed entering a room with no cocaine in his possession, exiting the room, and then turning the cocaine over" to officers). *See also, United States v. Williams*, 481 F.2d 725 (8th Cir. 1973); *United States v. Singer*, 732 F.2d 631 (8th Cir. 1984).

Thus, Petitioners overlook the fact that the "controlled buy" established probable cause to believe that Petitioner Gordon Haygood had violated drug laws and that these cases affirmatively establish Respondent's immunity from civil liability. Instead, the Petitioners argue that probable cause was negated because Respondent should have investigated further before applying for a search warrant.

It is well established that "[h]aving uncovered sufficient evidence to establish probable cause, [the officers] had no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." *Simkunas v. Tardi*, 930 F.2d 1287, 1292 (7th Cir. 1991) (citation omitted); *Schertz v. Waupaco County*, 875 F.2d 578, 583 (7th Cir. 1989) ("once police

officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence"). *See also, Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979) ("Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence").

In sum, not only did Respondent not violate any "clearly established" law, the law supported his acts. Unless this Court is inclined to make wholesale changes to the general law of qualified immunity, *certiorari* should be denied.

III. CONCLUSION

The Petition for Writ of *Certiorari* does not present an issue worthy of review by this Court. The parameters of qualified immunity have been repeatedly enunciated by this Court. The Eleventh Circuit strictly followed this Court's mandate on this issue and held Respondent was entitled to qualified immunity under the facts presented. In fact, the Eleventh Circuit opinion, by its own terms, is limited in scope to the specific facts involved and does not have the general and far-reaching impact as Petitioners suggest. Consequently, the opinion has little precedential value other than reiterating the proper analysis involved in the qualified immunity inquiry, with which

Petitioners, apparently, do not quarrel. As such, Respondent respectfully submits that the Petition for Writ of *Certiorari* should be denied.

Dated: September 19, 1996.

Respectfully submitted,

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